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论代孕的法律法规

Discussion on Legal Regulation for Surrogacy

韩燕平

指导教师姓名: 蒋月教授

专 业 名 称: 法律硕士

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## 内容摘要

我国不孕不育发病率高，代孕，作为人类辅助生殖技术的一种，用最根本、最直接的方式帮助了不孕不育家庭。然而，代孕也引发了很多的法律问题，如代孕协议的合法性、代孕子女的法律地位、代孕双方当事人合法权益的保障等等，对社会伦理道德、婚姻家庭结构和传统法律制度带来了深远的影响。我国对代孕持完全禁止的立场，现有的部委规章无法有效的解决代孕问题。从长远看，我国应当参考开放代孕的国家地区的立法实践，积极制定科学的代孕法律规制，合理的、限制的开放代孕，发挥出它有利的一面，满足不育夫妻的生育需求。

本文除引言和结语外，正文包括四章。

第一章是对代孕的概述。阐述了代孕的概念和分类，并分析讨论了我国代孕的立法和行业现状。虽然我国对代孕进行禁止和打击，但现有规范法律位阶低、约束力不足，代孕中介机构仍通过网站、微博、微信、QQ 等平台发展业务，代孕争议时有发生。通过讨论和介绍，引出我国代孕问题已不容回避，必须积极对待。

第二章对代孕的合法化进行分析。禁止代孕剥夺了不育夫妻平等地实现生育权和代孕母亲合法行使身体支配权的权利，违背了正义原则。而且，非商业性代孕属于利他行为，并未损害社会公共利益和善良风俗，根据无伤害不禁止原则，国家应该尊重当事人的选择。当下，国家应立法对代孕进行规范和引导。

第三章考察部分国家和地区立法规范代孕的实践。选取若干典型国家和地区的立法例，通过从完全禁止代孕、限制开放代孕、完全开放代孕三个角度进行比较分析，从中得出对我国代孕的立法启示。

第四章提出对我国代孕行为法律规制的构想。立足代孕合法化的前提下，提出我国代孕立法的应遵循的原则，并对代孕双方主体资格，代孕协议的生效与双方权利义务，代孕协议的终止与违约责任，以及代孕子女亲权的认定与取得方式进行了一定的研究，尽可能为我国建立代孕法律规制提出可行性建议和措施。

**关键词：**代孕；合法性；限制开放

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## ABSTRACT

The morbidity of infertility among the Chinese eligible couples is gradually increasing. As a kind of human assisted reproductive technology, surrogacy helps the infertile families by the most fundamental and direct way. However, lots of legal problems are caused by surrogacy such as the effectiveness of surrogacy contract, the identification ways of parental right for surrogacy children and the guarantee of legitimate interests for the two surrogacy parties, which have profound influences on the social ethics, marriage and family structure as well as traditional legal system. Currently, the absolute-banned attitude toward the surrogacy is taken by Chinese laws since the recent ministry regulations cannot effectively solve the surrogacy problems. In the long run, by referring to the legislative practices of the countries and regions with open policies for surrogacy, China should formulate the scientific surrogacy laws and regulations as well as open the surrogacy reasonably and restrictively in order to express its advantageous effect.

Except for the introduction and conclusion, this paper includes four chapters.

The first chapter is the overview of surrogacy, mainly illustrates the concept and classification of surrogacy and discusses the current legislative and industrial situations about surrogacy phenomenon in China. Although the surrogacy is banned and fought by China, since the recent relevant laws are positioned in the lower class and lack of constraining force, the surrogacy businesses can still be developed by the illegal surrogacy institutions by means of website, microblog, WeChat and QQ along with the occurrence of surrogacy disputes sometimes. After discussion and introduction, it is known that the surrogacy problems in China cannot be avoided and must be treated actively.

In the second chapter, the legalization of surrogacy is analyzed. Firstly, the reproductive right of the infertile couples are deprived by banning surrogacy,

which violates the principles of justice. Secondly, the surrogate mothers have the self-determined right of surrogacy for others as well as can exercise the legislative right of body domination. Thirdly, the non-commercial surrogacy is included in the altruistic behaviors, which won't damage the social public interests and good customs. According to the principle of no harm and no prohibition, China should respect the choices of parties. And currently, the relevant problems of surrogacy should be regulated by Chinese laws as soon as possible.

The third chapter investigates the practices of standardizing surrogacy by legislation in some countries and regions. Selecting legislative cases of several typical countries and regions, the comparative analysis is made from three angles which are absolute ban of surrogacy, restricted openness of surrogacy and absolute openness of surrogacy so as to obtain the legislation enlightenment for surrogacy in China.

In the fourth chapter, some legal system conceptions of surrogacy behaviors in China are proposed. On the basis of surrogacy legalization, the principles which should be followed in Chinese future surrogacy legislation are suggested. Meanwhile, this paper does some researches on the qualification of surrogacy parties, the effectiveness of surrogacy contract as well as the rights and responsibilities of the two parties, the termination of contract and its responsibility for breach, and the identification and acquisition ways of parental right for surrogacy children. Feasible suggestions and measures are proposed as far as possible for the surrogacy laws and regulations in China.

**Key Words:** Surrogacy; Legitimacy ; Limited open

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